

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

10/13
B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-2344

SIDNEY N. ROSENTHAL,

Plaintiff-Appellant,

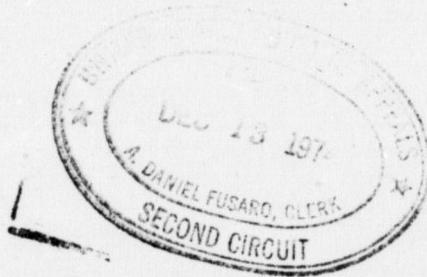
vs.

EMANUEL, DEETJEN & CO., HEINZ
BIEL, JOHN R. McDONNELL, PEYTON
KNIGHT, JEAN-FRANCOIS DeCHARRIERE,
WILLIAM G. FALLON, ROBERT P.
MAHUSKE, PETER McGEE, JOSEPH
TARANGELO, ESTATE OF ANDREW
WILLIAMS, ESTATE OF JOHN P. FAGEN,
ESTATE OF RUDOLPH DEETJEN, CARL
DEETJEN, MURIEL DEETJEN, RUDOLPH
H. DEETJEN, JR., PAUL PORZELT,
CHARLES SCHUBERT, BRIAN O'NEILL,
THOMAS J. STEVENSON, JR., ALBERT
EMANUELL, II,

Defendants-Appellees

BRIEF AND APPENDIX FOR APPELLANT

On Appeal from Order of the United States District
Court for the Southern District of New York



MURRAY M. WEINSTEIN
Attorney for Plaintiff-Appellant
217 Broadway
New York, N.Y. 10007

SAMUEL J. WEINSTEIN
Of Counsel

I N D E X T O B R I E F

	Page
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT:	
POINT I - There is no dispute as to claims of creditors arising prior to August 31, 1970 which requires arbitration	
A. The amount due plaintiff is undisputed...	5
B. The Court below erred in deciding that an actual dispute exists so as to require arbitration.....	7
C. If there are existing unpaid claims which arose prior to August 31, 1970, the Court should direct that 3.9% thereof be held in reserve.....	8
POINT II - Plaintiff's capital account is not affected by claims of creditors arising subsequent to the termination of his partnership interest, and any dispute in connection therewith is not arbitrable.....	9
CONCLUSION.....	12

CASES CITED

<u>Affiliated Food Distributors, Inc. v. Local Union No. 229, 483 F.2d 418 (3 Cir. 1973),</u> <u>cert. denied 415 U.S. 916.</u>	6
<u>Korody Marine Corp. v. Minerals & Chemicals Philipp Corp., 300 F.2d 124 (2 Cir. 1962)</u>	10
<u>Kramer (Matter of) & Uchitelle, Inc., 288 N.Y. 467 (1942)</u>	10

	Page
<u>Necchi v. Necchi Sewing Machine Sales Corp., 348 F.2d 693 (2 Cir., 1965), cert. denied, 383 U.S. 909.....</u>	5

OTHER AUTHORITIES CITED

<u>Domke, The Law and Practice of Commercial Arbitration (1968).....</u>	10
--	----

INDEX TO APPENDIX

Docket Entries.....	1a
Memorandum and Order of Knapp, U.S.D.J.....	2a
Defendants' Motion for Stay of Proceedings Pending Arbitration.....	6a
Plaintiff's Affirmation in Opposition to Defendants' Motion for Stay of Proceedings.....	10a
Notice of Appeal.....	16a
Exhibit "G" from Financial Statements of Emanuel, Deetjen & Co. (In Liquidation), "Partners Accounts," as of April 30, 1973.....	17a
Excerpts from Limited Partnership Agreement (Emanuel, Deetjen & Co.).....	18a

ISSUE PRESENTED FOR REVIEW

Whether there exists any dispute or controversy
regarding the amount due plaintiff upon his
withdrawal from the defendant partnership which
is required to be submitted to arbitration.

STATEMENT OF THE CASE

This appeal is from an Order of the United States District Court for the Southern District of New York entered September 11, 1974 (R.2a) which granted defendants' motion for a stay of this action pending arbitration. This action is one for a Declaratory Judgment pursuant to 28 U.S.C. Sections 2201 and 2202, fixing the rights and legal relations of the parties, including plaintiff's status as a creditor of the defendant partnership as of August 31, 1970, and the right to payment of his claim, now, of \$38,931.28 plus interest. Jurisdiction was based on diversity of citizenship. The notice of appeal was filed on October 3, 1974 (R.16a).

On or about November 1, 1967, plaintiff entered into a limited partnership agreement with the partners of Emanuel, Deetjen & Co., and contributed, as capital thereto, the sum of \$100,000.00.

On or about February 11, 1970, and in accordance with Paragraphs SIXTEENTH and TWENTIETH of the Limited Partnership Agreement (R.18a,19a), plaintiff gave notice of his withdrawal as a limited partner, said termination to become effective on August 31, 1970.

Plaintiff withdrew from the partnership on August 31, 1970 and demanded the value of his capital account, with interest thereon, as set forth in Paragraph TWENTY-SECOND of the partnership agreement (R.20a). Neither the defendant partnership, or the individual partner defendants have made any payment to plaintiff, whatsoever, from August 31, 1970 to date, of either the value of his capital account or the interest thereon.

The defendant partnership has, through its certified public accountant, determined the value of plaintiff's capital account as of August 31, 1970 (R.17a). The plaintiff, for the purposes of this proceeding, has accepted the value of \$38,931.28 as so determined.

SUMMARY OF ARGUMENT

Plaintiff terminated his limited partnership agreement with the defendant, Emanuel, Deetjen & Co., as of August 31, 1970. This is conceded by defendants (see defendants' answer, par. 2, admitting par. 9 of plaintiff's complaint). Plaintiff is now seeking a declaration by this Court as to his legal status as a creditor as of the date of termination, i.e., that as a creditor of Emanuel, Deetjen & Co. on August 31, 1970, he is entitled to payment, now, of

the amount due to him on termination. This amount has been determined by the defendants' certified public accountant (R.17a).

Defendants have made reference in their motion papers that the exact amount due plaintiff cannot be determined since there are still outstanding claims of creditors arising both before and after the date of plaintiff's termination (August 31, 1970), and that plaintiff is, in some way, responsible for a share of defendants' losses resulting from the sale of most of its assets on or about September 14, 1970, which sale produced a substantial loss to the partnership approximately two and one-half years later.

There is, however, no dispute as to the amount due plaintiff. Plaintiff has accepted the amount of his capital account as computed by defendants' certified public accountant, and seeks only to collect that amount which has been due to him for more than four years. Merely because the defendants say there is a factual dispute as to the amount due plaintiff does not prevent the Court from determining whether there is any basis for this claim so as to require arbitration. There is, furthermore, no liability of the plaintiff for claims arising subsequent to the date of his termination, and this allegation can in no way be regarded as a controversy arising out of or under the partnership agreement, which would require submission to arbitration.

A R G U M E N T

POINT I

THERE IS NO DISPUTE AS TO CLAIMS OF CREDITORS ARISING PRIOR TO AUGUST 31, 1970 WHICH REQUIRES ARBITRATION.

A. The Amount Due Plaintiff Is Undisputed.

Defendants maintain that plaintiff is responsible for his share of the claims of other creditors which arose before the termination of the limited partnership agreement between the parties on August 31, 1970. Plaintiff acknowledges this to be the law, but defendants have not come forward to show that, as of this date, more than four years after termination, there are any such unpaid creditors.

It is axiomatic that if there is no dispute arising under or out of the contract, then there is nothing to arbitrate. Or, stated another way, the parties could never have agreed to arbitrate that which is not, in fact, disputed. It is for the Court, and not the defendants, to make the determination as to whether there is an arbitral dispute.

In Necchi v. Necchi Sewing Machine Sales Corp., 348 F. 2d 693 (2 Cir., 1965), cert. denied 383 U.S. 909, the Court stated (p. 696):

"The Supreme Court has explicitly and unanimously reserved the question of arbitrability for the courts. 'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties,' Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241, 82 S. Ct. 1318, 1320, 8 L.Ed.2d 462 (1962). 'For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit,' United Steelworkers v. Warrior & Gulf Nav. Co., supra, 363 U.S. at 582, 80 S.Ct. at 1353."

See also, Affiliated Food Distributors, Inc. v. Local Union No. 229, 483 F. 2d 418 (3 Cir. 1973), cert. denied, 415 U.S. 916.

In Necchi, supra, the Court determined which issues were arbitrable and those which were not. The Court found, as a matter law, that as to some of the items raised there was no plausible claim that they arose out of the agreement and, therefore, arbitration was not required (p. 697).

It is incumbent upon the defendants here to establish the basis of their allegation that creditors' claims arising prior to August 31, 1970 do, in fact, exist. The plaintiff has demanded of defendants that they furnish him with copies of any creditor's claims still existing after four years, and which would affect plaintiff's capital account - but none has been furnished to plaintiff or to the Court.

B. The Court Below Erred In Deciding That An Actual Dispute Exists So As To Require Arbitration.

The Memorandum Order of the Court below states as follows:

"Despite the declaratory nature of plaintiff's complaint, the dispute is basically one for a sum of money owed to a partner upon withdrawal from the partnership." (R.5a).

Plaintiff agrees that he is seeking a declaration that he is entitled to receive from the defendants, now, a sum of money which has been due to him for more than four years. However, the primary issue of this case is whether the mere statement by defendants that there is a dispute, even though completely unsubstantiated, is sufficient to label this case a "dispute" for the purpose of compelling arbitration. It is plaintiff's position that a completely unsubstantiated allegation by defendants cannot require the "dispute" to be submitted to arbitration.

The Court below goes on to state (R.5a):

"...Article 22 of the Limited Partnership Agreement sets forth in detail the various rights of a withdrawing partner vis-a-vis the remaining partners. It includes a procedure for determining the value of the withdrawing partner's interest in the partnership, and sets forth a procedure for payment of the sum so agreed."

"This provision, along with the broad arbitration clause, indicates that the parties intended that disputes concerning the determination and method of payment to withdrawing partners be sent to arbitration. The controversy is therefore one which arises out of the contractual relationship of the parties."

These conclusions of the Court, as to why arbitration is necessary, beg the question, for the Court has assumed that there is a dispute where none in fact exists. It is respectfully submitted that the Court erred in its determination. It is clear from the record that there is no "controversy" or "dispute" which requires arbitration.

C. If There Are Existing Unpaid Claims Which Arose Prior To August 31, 1970, The Court Should Direct That 3.9% Thereof Be Held In Reserve.

After four years, it is highly unlikely that any creditors' claims which arose prior to August 31, 1970 have not been paid. As pointed out above, defendants have not come forward to identify any such claims. But assuming, arguendo, that the defendants satisfy this Court that there are such claims, the plaintiff's capital account is only affected by his 3.9% share thereof. This Court should declare that the sum of \$38,931.28, plus interest, be paid forthwith to plaintiff, less a reserve of 3.9% to be with-

held by defendants for the payment of any creditor whose claim they produce which has not yet been paid or taken into account by defendants' certified public accountant in the determination of the value of plaintiff's capital account as of August 31, 1970 (which he has determined to be \$38,931.28). For if defendants were now able to establish, for example, a creditor's claim of only \$100.00 (of which plaintiff's share would be \$3.90), there would certainly be no justice in continuing to withhold the remaining \$38,927.38 due plaintiff.

POINT II

PLAINTIFF'S CAPITAL ACCOUNT IS NOT
AFFECTED BY CLAIMS OF CREDITORS
ARISING SUBSEQUENT TO THE TERMINA-
TION OF HIS PARTNERSHIP INTEREST,
AND ANY DISPUTE IN CONNECTION THERE-
WITH IS NOT ARBITRABLE.

The claims of creditors arising subsequent to August 31, 1970 cannot affect the legal status of the plaintiff, nor the amount due to him from the defendants. As of the close of business on August 31, 1970, plaintiff was no longer a partner in the defendant partnership; he became a creditor thereof on that date. The New York Limited Partnership Law does not make a partner who has

terminated his partnership interest subject to the claims of creditors which arose subsequent to the date of termination. Nor do the defendants point to any clause of the limited partnership agreement which subjects the plaintiff to such liability. To the contrary, Paragraph TWENTY-FIRST (R.19a) specifically states that no partner shall share in any losses of the partnership incurred after the date of his withdrawal.

If the defendants are contending that there are transactions for which the plaintiff is responsible after the termination of the partnership agreement between them, then there is, in fact, no controversy which arises out of, or is related to that contract, which terminated on August 31, 1970. As pointed out in Domke, The Law and Practice of Commercial Arbitration, p. 68 ((citing Korody Marine Corp. v. Minerals & Chemicals Philipp Corp., 300 F.2d 124 (2 Cir. 1962)):

"The parties generally wish to settle all those disputes which arose under the contract. It therefore does not appear necessary that in all instances the demand for arbitration be made before the contract... expires. However, when a disputed transaction occurs after the expiration of the contract, arbitration cannot be had."

To the same effect, see Matter of Kramer & Uchitelle, Inc., 288 N.Y. 467 (1942), which involved the effect of

ceiling prices fixed by the Price Administrator on the prices set forth in the contract. The Court determined that this resulted in a legal termination of the contract, and the dispute as to what price controlled was not required to be submitted to arbitration.

"...Thus there was no 'controversy arising under or in relation to' the contracts. The arbitration clause was only an incidental part of an indivisible contract of purchase and sale and when the contract was at an end the arbitration provision no longer existed or had any force whatsoever (Mulji v. Cheong Yue Steamship Co., supra; Russell on Arbitration and Award, p. 78) except as to rights and wrongs which had already come into existence as to which the contract still remained in effect." (p. 472).

Defendants claim that plaintiff is responsible for the partnership losses which occurred about two and one-half years after the termination of plaintiff's partnership interest. These losses resulted when shares of stock received from Havenfield Corp. (another stock brokerage firm) as payment for the sale by the defendant partnership of most of its assets to Havenfield Corp. on September 14, 1970, became worthless - in February, 1973 (when Havenfield Corp. went out of business). This alleged liability cannot, in any way, be considered a dispute which arose under the agreement between the plaintiff and defendants, which agreement admittedly terminated on August 31, 1970.

C O N C L U S I O N

The defendants have delayed payment to plaintiff for more than four years. No controversy exists. Both in equity and in law, justice dictates that plaintiff be paid what is due to him, now, without the further delay of arbitrating that which is undisputed. The order of the District Court granting defendants' motion to stay this action pending arbitration should be set aside and vacated, and an order should be entered declaring the rights of the plaintiff as a creditor of the defendant partnership as of August 31, 1970 and, further, that plaintiff is entitled to payment now from the defendants of \$38,931.28 plus interest.

Respectfully submitted,

MURRAY M. WEINSTEIN
Attorney for Appellant

SAMUEL J. WEINSTEIN
Of Counsel

December 9, 1974.

APPENDIX

Docket No. 2344

DOCKET ENTRIES

- 1 -8-74 Complaint filed and Summons issued.
- 2-13-74 Summons filed with marshals return.
- 2-21-74 Filing of stipulation and order that time of defendant to answer complaint is extended.
- 4- 5-74 Answer to complaint filed.
- 4- 9-74 Filing of stipulation and order that time of defendant to answer complaint is extended.
- 7- 5-74 Filing of Memorandum & Order dismissing complaint without prejudice to the filing of an amended complaint alleging that each of the defendant-partnership's general partners is a citizen of and resident of some state other than Florida.
- 7-15-74 Amended Complaint filed.
- 9-11-74 Filing of Memorandum & Order granting defendants' motion to stay this action pending arbitration.
- 10- 3-74 Filing of plaintiff's notice of appeal from order granting defendants' motion to stay.

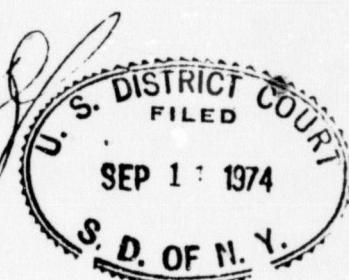
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
SHIRLEY N. ROSENTHAL,

plaintiff, :

- against - :

EMANUEL, DEETJEN & CO., HEINZ
BIEL, JOHN R. McDONNELL, PEYTON
KNIGHT, JEAN-FRANCOIS DeCHARRIERE,
WILLIAM G. FALLON, ROBERT P.
MAHUSKE, PETER McGEE, JOSEPH
TARANGELO, ESTATE OF ANDREW
WILLIAMS, ESTATE OF JOHN P. FAGEN,
ESTATE OF RUDOLPH DEETJEN, CARL
DEETJEN, MURIEL DEETJEN, RUDOLPH
H. DEETJEN, JR., PAUL PORZELT,
CHARLES SCHUBERT, BRIAN O'NEILL,
THOMAS J. STEVENSON, JR., ALBERT
EMANUELL II..



MEMORANDUM AND
ORDER

74 Civ. 123

MICROFILM

SEP 12 1974

Defendants. :

-----x
KNAPP, D.J.

Defendant moves to stay this action pending arbitration on the ground that arbitration of plaintiff's claim is mandatory under the terms of a limited partnership agreement entered into on November 1, 1967, between plaintiff and defendant, Emanuel, Deetjen & Co. The motion is granted.

Plaintiff terminated his limited partnership interest with defendant on August 31, 1970. He is now seeking a declaration that he is a creditor of defendant as of that date and that he is entitled to priority of payment of his claim of \$38,931.28 plus interest before any monies are paid to the remaining general or limited partners of Emanuel, Deetjen & Co. or to creditors of the defendant whose claims arose subsequent to August 31, 1970. Although defendant appears to admit that plaintiff is a creditor, it disputes the amount of plaintiff's claim, maintaining that the amount cannot be ascertained since there are still outstanding claims of creditors arising prior to August 31, 1970, and that plaintiff is responsible for losses resulting from the sale of defendant's assets in September, 1970, the contract for which was signed while plaintiff was still a limited partner.

Upon a careful review of the limited partnership agreements and the facts of the dispute, it would appear that plaintiff's claim is covered by the broad arbitration provision of the contract. This dispute is one which arises

out of the contractual relationship between the parties and appears to be one which the parties intended to be submitted to arbitration for resolution. See United Steelworkers v. Warrior & Gulf Nav. Co. (1963) 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; Atkinson v. Sinclair Refining Co. (1962) 370 U.S. 238, 82 S. Ct. 1318, 8 L. Ed. 2d 462; Necchi v. Necchi Sewing Machine Sales Corp. (2nd Circ. 1965) 348 F. 2d. 693; cert. denied 383 U.S. 909.

The arbitration clause contained in the limited partnership agreement provides in part as follows:

"Arbitration. Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration in New York City in accordance with the laws of the State of New York by three arbitrators to be appointed pursuant to the Rules of the American Arbitration Association....

Judgment upon the award rendered by the Arbitrators may be entered in any court having jurisdiction thereof.

....Notwithstanding the foregoing provisions, any party may invoke arbitration pursuant to the provisions of Article VIII of the Constitution of the New York Stock Exchange."

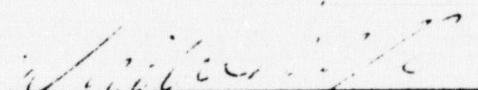
This controversy arises out of or relates to the contract, or its breach. Despite the declaratory nature of plaintiff's complaint, the dispute is basically one for a sum of money owed to a partner upon withdrawal from the partnership. Article 22 of the Limited Partnership Agreement sets forth in detail various rights of a withdrawing partner vis-à-vis the remaining partners. It includes a procedure for determining the value of the withdrawing partner's interest in the partnership, and sets forth a procedure for payment of the sum so agreed upon.

This provision, along with the broad arbitration clause, indicates that the parties intended that disputes concerning the determination and method of payment to withdrawing partners be sent to arbitration. The controversy is therefore one which arises out of the contractual relationship of the parties.

Accordingly, the defendant's motion is granted.

SO ORDERED.

Dated: New York, New York
September 9, 1974


WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

SIDNEY N. ROSENTHAL

Plaintiff

CIVIC ACTION

-against-

FILE NO. 74-123

EMANUEL, DEETJEN & CO., HEINZ
BJEL, JOHN R. McDONNELL, PEYTON
KNIGHT, JEAN-FRANCOIS DeCHARRIERE
WILLIAM G. FALLON, ROBERT P.
MAHUSKE, PETER McGEE, JOSEPH
TARANGELO, ESTATE OF ANDREW
WILLIAMS, ESTATE OF JOHN P. FAGEN,
ESTATE OF RUDOLPH DEETJEN, CARL
DEETJEN, MURIEL DEETJEN, RUDOLPH
H. DEETJEN, JR., PAUL PORZELT,
CHARLES SCHUBERT, BRIAN O'NEILL,
THOMAS J. STEVENSON, JR., ALBERT
EMANUELL II

NOTICE OF MOTION

Defendants

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of JOHN R. McDONNELL, sworn to on the 8th day of March, 1974, the undersigned will move this Court at a part thereof for the hearing of motions to be held at Room 706 of the United States Courthouse, Foley Square, New York City, New York, on the 5th day of April, 1974 at 2:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for an order staying all further proceedings in this matter and directing plaintiff to proceed to arbitration in accordance with the terms and conditions of a partnership agreement dated as of November 1, 1967, between plaintiff and defendant and for such other and further relief as to the Court may seem just and proper.

Dated: March 11, 1974

Edmund S. Purves

EDMUND S. PURVES
Attorney for Defendant
430 Park Avenue
New York, New York 10022
Telephone: 935-6345

TO: MURRAY WEINSTEIN, LSQ.
Attorney for Plaintiff
217 Broadway
New York City, N.Y. 10007

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

SIDNEY N. ROSENTHAL

Plaintiff

CIVIL ACTION

-against-

FILE NO. 74 - 123

EMANUEL, DEETJEN & CO., HEINZ
BJEL, JOHN R. McDONNELL, PEYTON
KNIGHT, JEAN-FRANCOIS DeCHARRIERE
WILLIAM C. FILION, ROBERT P.
MAHUSKE, PETER MCGEE, JOSEPH
TARANGLO, ESTATE OF ANDREW
WILLIAMS, ESTATE OF JOHN P. FAGEN,
ESTATE OF RUDOLPH DEETJEN, CARL
DEETJEN, MURIEL DEETJEN, RUDOLPH
H. DEETJEN, JR., PAUL PORZELT,
CHARLES SCHUBERT, BRIAN O'NEILL,
THOMAS J. STEVENSON, JR., ALBERT
EMANUELL II

AFFIDAVIT

Defendants.

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

JOHN R. McDONNELL, being duly sworn, deposes and says
as follows:

1. I am a partner of Emanuel, Deetjen & Co., a limited
partnership defendant herein.

2. I am fully familiar with the subject matter of the
complaint herein and make this affidavit in support of motion to stay
all proceedings in this action and to compel plaintiff to arbitrate
the alleged controversy between plaintiff and defendant.

3. On or about the 1st day of November, 1967, plaintiff
became a limited partner of Emanuel, Deetjen & Co. and signed a
partnership agreement made as of said date.

4. Article Thirty-First of said partnership agreement
provides in part as follows: "Arbitration. Any controversy or claim
arising out of or relating to this contract or the breach thereof,
shall be settled by arbitration in New York City in accordance with
the laws of the State of New York by three arbitrators to be appointed
pursuant to the Rules of the American Arbitration Association, and
said arbitration shall be conducted in accordance with the Rules of

said Association. Judgment upon the award rendered by the Arbitrators may be entered in any court having jurisdiction thereof.

..... Notwithstanding the foregoing provisions, any party may invoke arbitration pursuant to the provisions of Article VIII of the Constitution of the New York Stock Exchange."

5. Although plaintiff alleges that he is entitled to the value of his capital account in the amount of \$38,931.28, the general partners of Emanuel, Deetjen & Co., believe that this amount is substantially over-stated and cannot be ascertained at this time for the following reasons:

a. Plaintiff was still a limited partner of defendant at the time the contract for the sale of its assets was entered into and he has not been charged for all the losses resulting therefrom nor for all the liabilities incurred before his interest as a limited partner terminated.

b. Defendant has not paid all claims of creditors arising prior to August 31, 1970.

c. Defendant has not made provision for paying all claims of creditors arising subsequent to August 31, 1970 and plaintiff is liable for his pro-rata share thereof.

6. Until the accounts of all the partners have been recalculated, and all the above described debts and liabilities have been paid or adequately provided for, it will be impossible to determine plaintiff's interest in defendant and make any payment thereon.

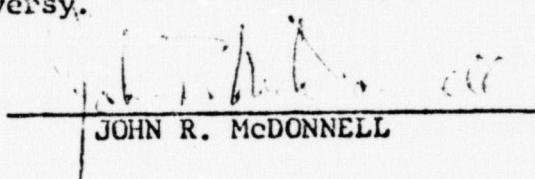
7. The subject matter of the complaint herein was clearly contemplated by the arbitration agreement. It is a matter relating to the correctness of the account and just what debts and liabilities are to be charged to plaintiff.

8. A copy of the complaint is attached hereto and marked EXHIBIT A.

9. Defendant is entitled to have all further proceedings in this action stayed pending the determination of the arbitration of the alleged dispute between the parties hereto.

10. No previous application has been made for the relief or order sought herein.

WHEREFORE, your deponent prays that an order be entered directing plaintiff to arbitrate the alleged dispute between himself and defendant and staying all proceedings in this action pending the arbitration of the alleged controversy.


JOHN R. McDONNELL

Sworn to before me this
8th day of March, 1974

Eduard S. Pava

Notary Public

EDUARD S. PAVA
NOTARY PUBLIC
NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SIDNEY N. ROSENTHAL,

CIVIL ACTION NO. 74-123

Plaintiff

-against-

EMANUEL, DEETJEN & CO., HEINZ
BIEL, JOHN R. McDONNELL, PEYTON
KNIGHT, JEAN-FRANCOIS DeCHARRIERE,
WILLIAM G. FALLON, ROBERT P.
MAHUSKE, PETER McGEE, JOSEPH
TARANGELO, ESTATE OF ANDREW
WILLIAMS, ESTATE OF JOHN P. FAGEN,
ESTATE OF RUDOLPH DEETJEN, CARL
DEETJEN, MURIEL DEETJEN, RUDOLPH
H. DEETJEN, JR., PAUL PORZELT,
CHARLES SCHUBERT, BRIAN O'NEILL,
THOMAS J. STEVENSON, JR., ALBERT
EMANUELL II,

AFFIRMATION IN
OPPOSITION

Defendants.

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

The undersigned, an attorney duly admitted to practice
in the Courts of the State of New York, affirms:

1. He is the attorney for the plaintiff herein, who
resides in the State of Florida. Deponent is fully familiar with
the facts herein, based upon his study of the correspondence,
agreements, documents and other written papers, and from his
conversations with the plaintiff and others, and from his investi-
gation of the facts of this case. This affirmation is submitted
in opposition to the defendants' notice of motion dated March 11,
1974 for an order staying all further proceedings herein, and in
answer to the statements made in the affidavit annexed to said
notice of motion.

2. The moving affidavit asserts (par. 5) that the amount of \$38,931.28 is an overstatement of the value of plaintiff's capital account (as of August 31, 1970), for three reasons, alleged as follows:

- a. "Plaintiff was still a limited partner at the time the contract for the sale was entered into and he has not been charged for all losses resulting therefrom..." (The remaining language of par. 5a sets forth the same reason covered by defendants in their par. 5b, which will be discussed below)

As set forth in the complaint (par. 8), which fact is admitted by defendants (par. 5 of defendants' answer), plaintiff gave notice of his withdrawal as a limited partner on February 11, 1970, to become effective on August 31, 1970. Under the terms of the partnership agreement, the plaintiff's capital account as of August 31, 1970 was to be paid to him within 3 months of the termination of his partnership interest (partnership agreement, par. twenty-second). What is important is that plaintiff became a creditor of the defendant partnership on August 31, 1970, and defendants' answer (par. 2) admits the allegations of plaintiff's complaint (par. 9) which states,

"That plaintiff, having terminated his limited partnership with the defendant, Emanuel, Deetjen & Co., became a general creditor thereof, on August 31, 1970, to the extent of the amount in his capital account on said date, including interest thereon at the rate of six (6%) per cent per annum, as provided for in paragraph twenty-two of the partnership agreement."

It is to be noted that this admission of plaintiff's status as a creditor on August 31, 1970 has been made in defendants' answer, which was served subsequent to the filing of defendants' motion herein.

The contract of sale of most of the defendant partnership assets occurred long after February 11, 1970. The sale of these assets took place on either September 14 or 15, 1970, after the termination of plaintiff's interest in the defendant partnership. It is obviously legally immaterial to the determination of plaintiff's capital account as to what consequences were to flow from a transaction which occurred after August 31, 1970, whether ~~that~~ sale was profitable or not.

- b. "Defendant has not paid all claims of creditors arising prior to August 31, 1970."

It is now three and one-half years after the termination of plaintiff's interest in defendant partnership. The probability of any claims which arose prior to August 31, 1970 not being known by this time seems most unlikely. If there are any such claims, the defendant partnership should identify the same to this Court. Plaintiff does not contest that creditors prior to August 31, 1970 are entitled to payment of their claims from partnership assets prior to the payment of plaintiff's claim. If the defendants can identify any such claims, the amount thereof, as it might affect plaintiff's capital account figure of \$38,931.28, can be directed by this Court to be held in reserve, and the amount reserved can be directed to be paid over to the plaintiff by the defendant partnership when the claim is paid or settled. It should be recognized that plaintiff's share of any claims which arose prior to August 31, 1970, and which have not yet been paid, is only 3.9%. At this time, plaintiff does not dispute the determination of defendants' accountant that the amount owed to plaintiff is \$38,931.28 (less 3.9% of any claims still due to creditors whose claims arose prior to August 31,

1970, if any). No further accounting is necessary. Plaintiff does not intend to contest the amount of such prior claims, if any. The reserve to be set aside can be used to pay the balance of the amount due plaintiff when those prior claims have been settled and paid.

Annexed hereto is a balance sheet of the defendant partnership, as of August 27, 1973 (the latest balance sheet of which plaintiff is aware). This balance sheet was prepared by the defendants' accountant, Louis Zinman & Co., certified public accountants, of 135 E. 44th Street, New York City. Said balance sheet shows that the defendant partnership has assets of \$393,270.09, which, upon information and belief, is a sum far in excess of any possible unpaid amount due to creditors whose claims arose prior to August 31, 1970.

c. "Defendant has not made provision for paying all claims of creditors arising subsequent to August 31, 1970 and plaintiff is liable for his pro-rata share thereof."

As a matter of law, plaintiff has no responsibility for claims of creditors which arose after the termination of his interest in the defendant partnership.

3. As to the assertion in defendant's affidavit that plaintiff's capital account on August 31, 1970 was not \$38,931.28, this figure is the amount set forth by defendants' certified public accountant, Louis Zinman & Co., in the statement of partners' capital accounts (see Exhibit B annexed to the complaint, and see the balance sheet annexed hereto).

4. Plaintiff's action is for a declaratory judgment, praying for a declaration by this Court as to plaintiff's standing as a creditor of the defendant partnership on August 31,

1970, upon the termination of his partnership interest, that he is entitled to payment on said claim before any monies are paid to any creditors whose claims arose subsequent to that date and before any monies are paid to the present partners of the defendant, Emanuel, Deetjen & Co. It is evident from paragraphs 5a and 5c of the moving affidavit herein that defendants' legal position is that (1) because plaintiff was still a limited partner at the time of the contract for sale of most of its assets (even though he was not a partner at the time of the sale on September 14, 1970), he is to be charged with all losses resulting from said sale, and (2) plaintiff is liable for a pro-rata share of claims of creditors arising subsequent to August 31, 1970. The question of plaintiff's status on August 31, 1970 is a legal issue, and solely a legal issue, which this Court has the right to define in a declaratory judgment, and this legal issue is not required to be submitted to arbitration.

WHEREFORE, your deponent prays that the defendants' motion for a stay of all proceedings in this action be denied.

Murray M. Weinstein
MURRAY M. WEINSTEIN

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: New York, N.Y.
April 2, 1974

Murray M. Weinstein
MURRAY M. WEINSTEIN

EMANUEL, DEETJEN & CO.
(IN LIQUIDATION)

Balance Sheet
August 21, 1973

ASSETS

Cash with Edmund S. Purves	\$ 956.82
General Partners' Debit Balances	
William G. Fallon	\$ 28,413.69
J. J. Fagan (Estate)	35,027.82
Peyton Knight	29,930.53
Robert P. Mahuske	109,772.60
John R. McDonnell	45,962.65
Peter P. McGee	44,706.36
Andrew Williams (Estate)	<u>32,958.59</u>
	326,772.24
General Partner Retired	
J. F. DeCharriere	65,541.03
	<u><u>\$393,270.09</u></u>

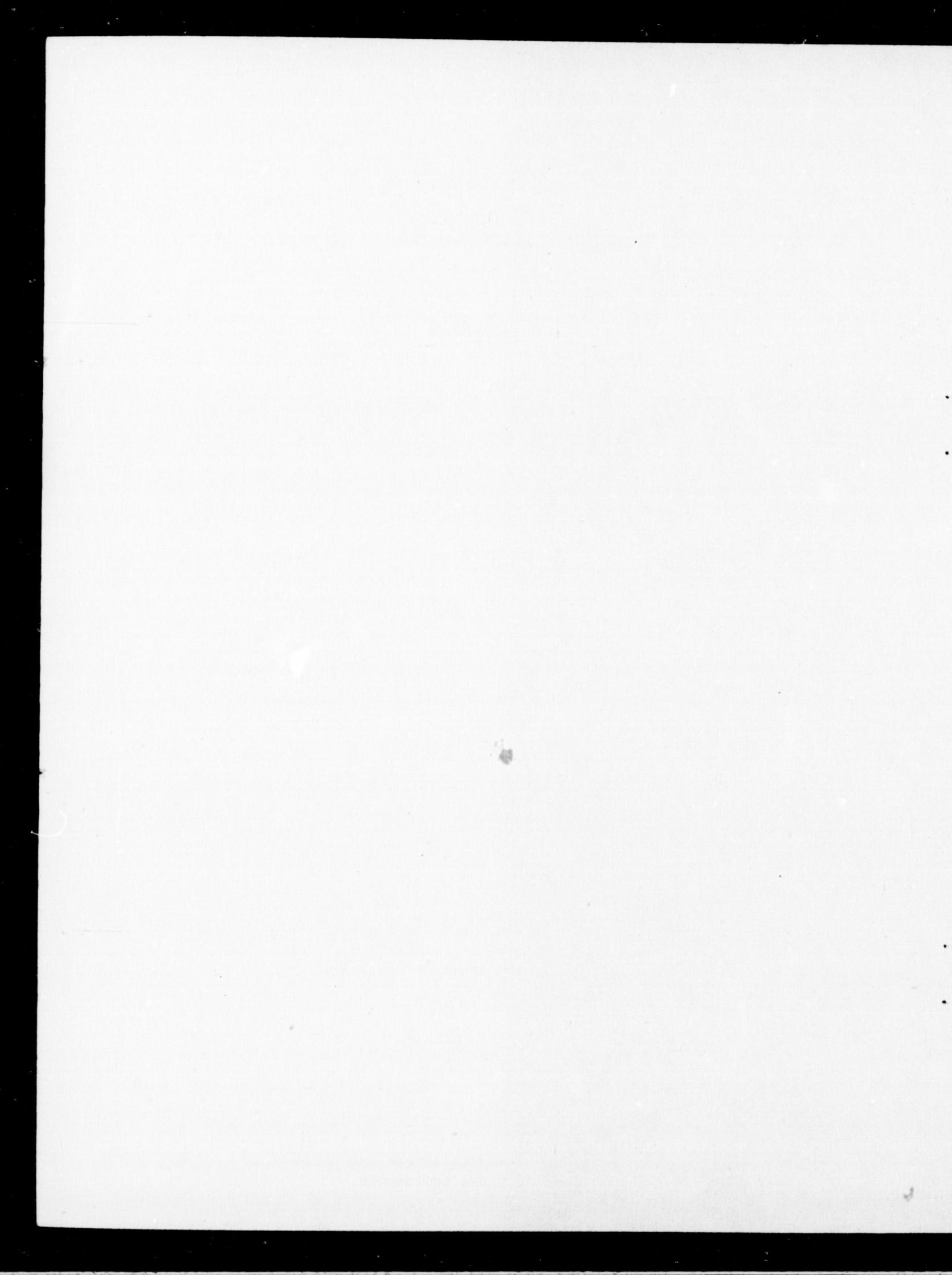
Reference is made to the accompanying letter and notes
which are an integral part of these statements.

EXHIBIT "A"

LIABILITIES

Due to Havenfield Corporation	\$ 3,685.25
Loan Payable (Interest Equalization Tax)	
Carl Deetjen	\$ 28,292.69
Paul Porzelt	105,125.00
Heinz Biel	<u>25,000.00</u>
	158,417.69
Retired Partners' Credit Balances	
Bruce Balding	\$ 32,263.38
F. Praeger	29,494.33
S. Rosenthal	38,931.28
Paul Porzelt (4/30/69)	<u>21,426.76</u>
	122,115.75
Limited Partners' Credit Balances	
Carl Deetjen	\$ 22,699.62
Rudolph H. Deetjen, Jr.	24,363.92
Albert Emanuel II	30,719.36
Charles B. Schubert	5,283.87
Muriel C. Deetjen	*
Brian O'Neill	*
Paul Porzelt	*
T. J. Stevenson	<u>*</u>
	83,066.77
General Partners' Credit Balances	
Heinz H. Biel	\$ 24,835.19
Joseph Tarangelo	<u>1,149.44</u>
	<u>25,984.63</u>
	<u>\$393,270.09</u>

* Losses charged to these partners have completely absorbed their capital contributions, so that no further losses are chargeable to them.



NOTICE OF APPEAL

(Filed-October 3, 1974)

Notice is hereby given that SIDNEY N. ROSENTHAL,
plaintiff above named, hereby appeals to the United States
Court of Appeals for the Second Circuit from the Order
granting defendants' motion to stay the within action
pending arbitration, entered in this action on September
11, 1974.

Dated: September 30, 1974

MURRAY M. WEINSTEIN
Attorney for Appellant
217 Broadway
New York, N.Y. 10007

EMANUEL, DEETJEN & CO. (IN LIQUIDATION)Partners Accounts4/30/73

	<u>Capital Accounts 4/30/70-73 Inc.</u>	<u>Balance in P & L Accounts Adjusted 4/30/72</u>	<u>Fiscal Year Ende</u>	
			<u>Int. Eq. Tax and Expense</u>	<u>Other Ordina Losses</u>
General Partners:				
Heinz H. Biel	\$ 200,000.00	\$ (127,674.19)	\$ (4,862.15)	\$ (32,445.6
William G. Fallon	60,000.00	(76,104.64)	(1,667.02)	(11,124.1
J.J.P. Fagan (deceased 11/30/71)	100,000.00	(110,264.08)		(11,124.1
Peyton Knight	30,000.00	(51,967.68)	(277.89)	(5,562.1
Robert P. Mahuske	45,000.00	(126,944.18)	(2,500.55)	(16,686.3
John R. McDonnell	100,000.00	(118,920.98)	(3,334.06)	(22,248.3
Peter P. McGee	20,000.00	(53,283.52)	(277.89)	(5,562.0
Joseph Tarangelo	20,000.00	(14,723.12)		(1,854.0
Paul Porzelt (4/30/69)		25,062.82	(3,472.94)	
Andrew Williams (deceased 3/26/71)	75,000.00	(90,031.34)	(1,111.33)	(11,124.1
	<u>\$ 650,000.00</u>	<u>\$ (744,850.91)</u>	<u>\$ (17,503.83)</u>	<u>\$ (117,731.1</u>
Limited Partners:				
Muriel C. Deetjen	\$ 150,000.00	\$ (133,233.75)	\$	\$ (1,009.5
Carl Deetjen (5/1/70)	90,000.00	(47,955.32)	(1,667.03)	(7,208.6
Rudolph H. Deetjen, Jr.	100,000.00	(58,036.35)		(7,208.6
Albert Emanuel II	300,000.00	(216,482.30)		(21,625.4
Brian O'Neill	100,000.00	(91,377.88)		
Paul Porzelt (5/1/69)	100,000.00	(95,433.61)		(4,566.3
Charles B. Schubert	100,000.00	(77,116.82)		(7,208.4
T. J. Stevenson	100,000.00	(88,816.31)		(679.3
	<u>\$1,040,000.00</u>	<u>\$ (808,452.34)</u>	<u>\$ (1,667.03)</u>	<u>\$ (49,506.4</u>
Retired Partners:				
Rudolph H. Deetjen (deceased)	\$	\$ 33,609.00	\$	\$
Bruce Balding		34,008.70	(1,667.03)	
J. F. DeCharriere		(46,339.70)	(17,469.14)	
F. Praeger (8/31/70)	100,000.00	(66,657.01)		
S. Rosenthal (8/31/70)	100,000.00	(59,220.06)		
	<u>\$ 200,000.00</u>	<u>\$ (104,599.07)</u>	<u>\$ (19,136.17)</u>	<u>\$ -</u>
Total	<u>\$1,890,000.00</u>	<u>\$ (1,657,902.32)</u>	<u>\$ (38,307.03)</u>	<u>\$ (167,237.5</u>

Reference is made to the accompanying letter and notes
which are an integral part of these statements.

EXHIBIT "G"

PLAINTIFF'S EXHIBIT B
(ANNEXED TO COMPLAINT)

April 30, 1973			Adjustments for Retired Limited Partners 4/30/70	Balance in P & L Accounts Adjusted 4/30/73	Balance in Capital Accounts 4/30/73
	Capital Loss	Total Loss Exhibit "F"	Additions and Withdrawals		
0	\$ (40,179.38)	\$ (77,487.13)	\$ 29,827.65	\$ 692.00	\$ (174,641.67)
9	(13,775.76)	(26,566.97)	12,100.00	237.28	(90,334.33)
9	(13,775.76)	(24,899.95)		237.28	(134,926.75)
0	(6,887.88)	(12,727.87)	3,710.00	118.62	(60,866.93)
0	(20,663.64)	(39,850.49)	4,035.20	355.91	(162,403.56)
8	(27,551.53)	(53,133.97)	17,976.50	474.53	(153,603.92)
9	(6,887.88)	(12,727.86)	250.00	118.62	(65,642.76)
9	(2,296.05)	(4,150.14)		39.54	(18,833.72)
	-	(3,472.94)			1,166.28
					21,589.88
8					21,589.88
2	<u>(13,775.76)</u>	<u>(26,011.27)</u>	<u>6,000.00</u>	<u>237.28</u>	<u>(109,805.33)</u>
2	<u>\$ (145,793.64)</u>	<u>\$ (281,028.59)</u>	<u>\$ 73,899.35</u>	<u>\$ 2,511.06</u>	<u>\$ (949,469.09)</u>
9	\$ (15,756.66)	\$ (16,766.25)	\$	\$	\$ (150,000.00)
1	(10,504.61)	(19,380.25)		197.70	(67,137.87)
1	(10,504.60)	(17,713.21)		197.70	(75,551.86)
9	(31,513.32)	(53,138.81)		593.15	(269,027.96)
	(8,622.12)	(8,622.12)			(100,000.00)
		(4,566.39)			(100,000.00)
4	(10,504.36)	(17,712.80)		197.71	(94,631.91)
3	(10,504.36)	(11,183.69)			(100,000.00)
6	<u>\$ (97,910.03)</u>	<u>\$ (149,083.52)</u>	<u>\$ -</u>	<u>\$ 1,186.26</u>	<u>\$ (956,349.60)</u>
					<u>\$ 83,650.40</u>
	\$	\$	\$ (33,609.00)	\$	\$
			(1,667.03)		32,341.67
			(17,469.14)		(63,808.84)
					(63,808.84)
			(2,000.00)	(1,848.66)	29,494.33
				(1,848.66)	(61,068.72)
					38,931.28
	\$	-	\$ (19,136.17)	\$ (35,609.00)	\$ (3,697.32)
					\$ (163,041.56)
					\$ 36,958.44
8	<u>\$ (243,703.67)</u>	<u>\$ (449,748.28)</u>	<u>\$ 38,290.35</u>	<u>\$ -0-</u>	<u>\$ (2,068,860.25)</u>
					<u>\$ (178,860.25)</u>

EXCERPTS FROM LIMITED PARTNERSHIP AGREEMENT

(Emanuel, Deetjen & Co.)

SIXTEENTH: Withdrawal. Any General or Limited Partner shall cease to be a partner and shall no longer have authority to exercise voting rights hereunder and, if a General Partner, shall no longer have any authority to sign for, obligate or commit the partnership in any respect whatsoever, or to exercise dominion or control over the assets or property of the partnership, upon death, or upon adjudication as a bankrupt or an incompetent, or upon receipt of notice of recall in accordance with the provisions of Paragraph "SEVENTEENTH"; provided, however, that solely for the purposes of Paragraph "TWENTY-FIRST", relating to "Disposition of Profits, etc. Upon Withdrawal" and Paragraph "TWENTY-SECOND", relating to "Purchase Price for Interest of Withdrawing Partner", such partner shall be deemed to have withdrawn from the partnership at the end of the month in which his death occurs, or in which he is adjudicated a bankrupt or incompetent, or in which he receives notice of recall. In addition, a General Partner shall be considered to have withdrawn from the partnership on his voluntary or mandatory retirement in accordance with the provisions of Paragraphs "EIGHTEENTH" and "NINETEENTH", and a Limited Partner shall be considered as having so withdrawn on his giving or receiving notice in accordance with the provisions

EXCERPTS FROM LIMITED PARTNERSHIP AGREEMENT

(Emanuel, Deetjen & Co.)

of Paragraph "TWENTIETH". On the occurrence of any such withdrawal, the partnership shall continue among the remaining partners until such time as it shall be terminated in accordance with the provisions of Paragraph "TWENTY-SIXTH".

* * *

TWENTIETH: Withdrawal of Limited Partner by Notice.

A Limited Partner may elect to withdraw as of the last day of any calendar month by giving notice to all other partners at least six months prior to such date. Notwithstanding the foregoing, a majority in interest of the General Partners may agree to his withdrawal prior to the expiration of the six-month period. A Limited Partner (except Muriel C. Deetjen, Rudolph H. Deetjen, Jr., Albert Emanuell, II, and Carl A. Deetjen when he becomes a Limited Partner) may be required to withdraw as of the end of any calendar month upon notice signed by a majority in interest of the General Partners at least six months prior to such date.

TWENTY-FIRST: Disposition of Profits, etc. Upon Withdrawal.

From the date of his withdrawal, no partner shall be entitled to any interest provided for in Paragraph "EIGHTH", any salary provided for in Paragraph "NINTH", or any share provided in

EXCERPTS FROM LIMITED PARTNERSHIP AGREEMENT

(Emanuel, Deetjen & Co.)

Paragraph "TENTH" in the profits of the partnership, earned subsequent to such date, nor shall he participate in any losses incurred thereafter. Profits and losses of the partnership shall thereafter be distributed among, or borne by, the remaining partners in proportion to the profit parts allocated to such remaining partners in Paragraph "TENTH".

TWENTY-SECOND: Purchase Price for Interest of Withdrawing Partner. Upon the withdrawal of a partner, the value of his interest in the partnership, as of the date of such withdrawal, shall be determined with binding effect upon all partners by a firm of certified public accountants selected by a majority of the partners, the partner who has withdrawn or his personal representative having one vote for such purpose. In making such determination, such firm of accountants shall give effect to the provisions of Paragraphs "TENTH (b)", "ELEVENTH (c)", and "TWENTY-SEVENTH". It shall prepare and submit a financial statement on which its said determination is based, and copies shall be furnished to the withdrawing partner or his personal representative.

Within three months from the date of withdrawal,

EXCERPTS FROM LIMITED PARTNERSHIP AGREEMENT

(Emanuel, Deetjen & Co.)

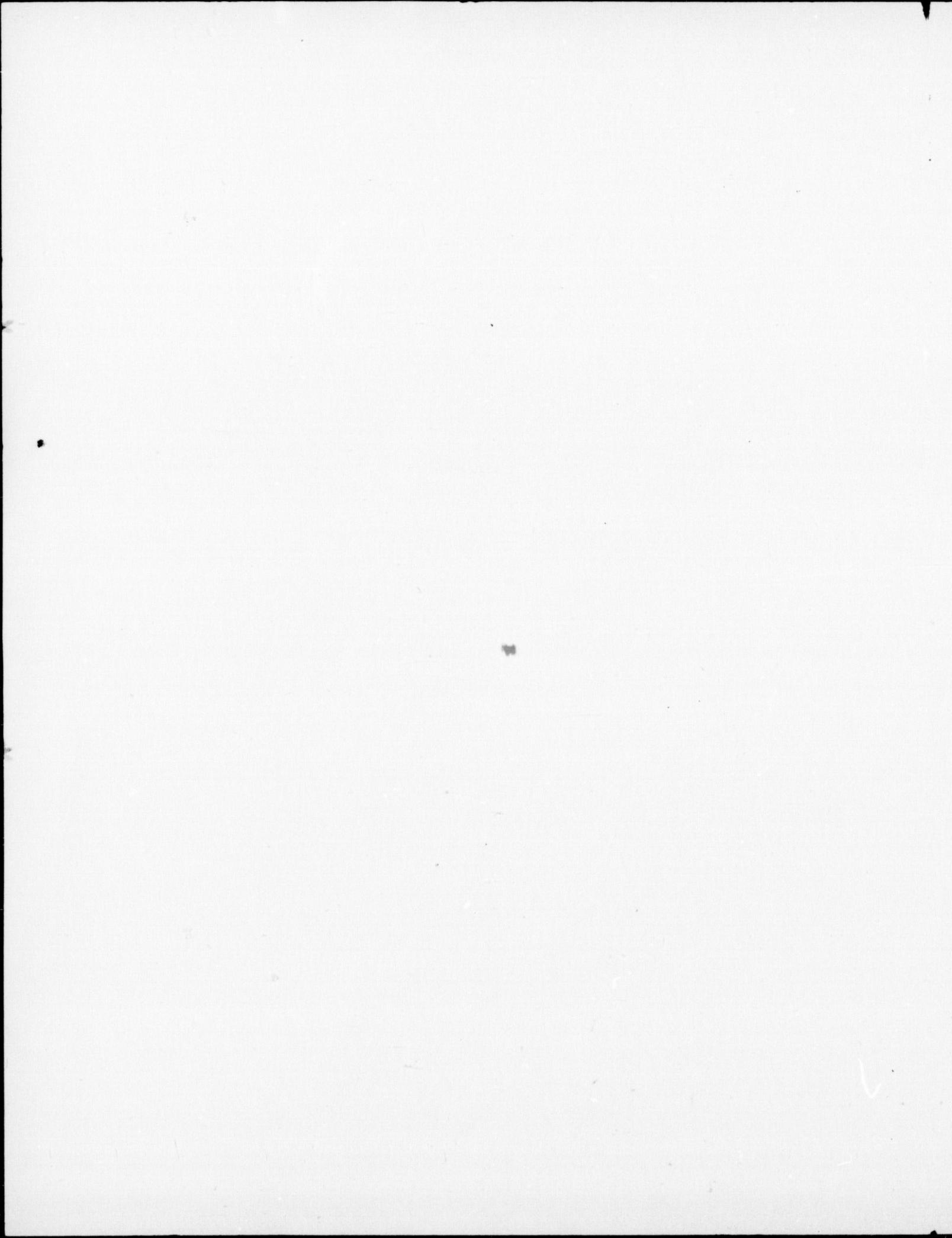
in case of a withdrawal in accordance with Paragraphs "SEVENTEENTH", "EIGHTEENTH", NINETEENTH", or TWENTIETH", or within six months from such date, in the case of any other withdrawal referred to in Paragraph "SIXTEENTH", the withdrawing partner or his estate shall be paid an amount equal to the value of his interest in the partnership determined as aforesaid as the purchase price of such interest, with interest thereon from the date of withdrawal at the rate of 6% per annum. Estimated payments on account of interest charges shall be made at the end of each calendar month from the date of withdrawal, until the said purchase price, with interest thereon, has been fully paid.

With the consent of a majority in interest of the General Partners, the estate of a deceased, incompetent or bankrupt partner may be paid advances on the purchase price for his interest prior to the expiration of the six-month period.

* * *

THIRTY-FIRST: Arbitration.

Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration in New York City in accordance with the laws of the



EXCERPTS FROM LIMITED PARTNERSHIP AGREEMENT

(Emanuel, Deetjen & Co.)

State of New York by three arbitrators to be appointed pursuant to the Rules of the American Arbitration Association, and said arbitration shall be conducted in accordance with the Rules of said Association. Judgment upon the award rendered by the Arbitrators may be entered in any court having jurisdiction thereof.

* * *

Notwithstanding the foregoing provisions, any party may invoke arbitration pursuant to the provisions of Article VIII of the Constitution of the New York Stock Exchange.